

**Seattle Opera Association and American Guild of Musical Artists, AFL-CIO, Petitioner.** Case 19-RC-13939

August 24, 2000

**DECISION ON REVIEW AND ORDER**

**BY CHAIRMAN TRUESDALE AND MEMBERS  
LIEBMAN AND HURTGEN**

On May 3, 2000, the Regional Director for Region 19 issued a Decision and Direction of Election finding that the Employer's auxiliary choristers are not employees as defined in Section 2(3) of the Act, but rather are volunteers. The Petitioner filed a timely request for review of the Regional Director's decision, and the Employer filed a brief in opposition to the request for review.

On May 25, 2000, the Board granted the Petitioner's request for review. Thereafter, the Petitioner filed a brief on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, including the Petitioner's brief on review, we conclude, contrary to the Regional Director, that the auxiliary choristers are employees within the meaning of Section 2(3) of the Act.

**Facts**

The Employer is a not-for-profit opera company engaged in producing approximately five operatic productions per year in Seattle, Washington.

The Petitioner currently represents a unit of choristers, dancers, stage managers, assistant stage managers, and assistant stage directors. The most recent agreement (AGMA agreement) is effective until July 31, 2002. Choristers fall into several categories including regular choristers and temporary regular choristers. The AGMA agreement also defines the positions of alternate and auxiliary choristers, although such positions are not covered by the contract and are not included in the currently represented unit. By its petition, the Petitioner seeks to add alternate and auxiliary choristers to the existing unit by means of a self-determination election. The parties agree that alternate choristers are statutory employees and are properly included in the appropriate voting group. They disagree as to the status of the auxiliary choristers.

There are 36 regular choristers who are named every other year following biannual open chorus auditions before the general director. To become a regular chorister, an individual must pass the open chorus audition, agree to perform at least 50 percent of the operas offered in a season, and have sung in two previous Seattle Opera productions or two other professional productions. Performing as an auxiliary chorister counts toward the regular choristers' requirement of singing in two previous productions. When there are vacancies among the regu-

lar choristers, temporary regular choristers fill those positions.

Alternate choristers are chosen from the auxiliary ranks and, pursuant to the AGMA agreement, are given first right of refusal for temporary regular chorister positions when regular choristers are on leave or absent. Alternates are compensated at a rate of \$20 for each rehearsal and performance in which they participate. The AGMA agreement allows the Employer to name up to 16 alternate choristers for a production.

Auxiliary choristers are used when a production requires more than 36 choristers. Auxiliary choristers audition, along with alternates, before a musical committee. At any given time there are 100-200 auxiliary choristers in the Employer's database. Once engaged for a production, auxiliary choristers are required to sign a "Letter of Intent" agreeing to be available for all rehearsals and performances for the production.<sup>1</sup> Auxiliary choristers receive a handbook and sign a "Letter of Understanding" agreeing to comply with attendance and decorum requirements "as a condition of being considered as an auxiliary chorister." The auxiliary choristers are expected to sign in at rehearsals on the same attendance sheet as all other choristers. Auxiliary choristers also share dressing rooms with other choristers and receive makeup instruction and costume fittings with the other choristers. Supernumeraries<sup>2</sup> and the children's chorus, designated as volunteers by the Employer, use different dressing rooms from those used by the rest of the choristers. During a performance, auxiliaries sing with other choristers and sometimes sing in small groups with regular choristers. All choristers, including auxiliaries, are listed alphabetically in the production program under the heading, "Chorus," whereas supernumeraries and the children's chorus are listed under their specific volunteer positions.

The majority of the Employer's currently employed regular choristers sang with the Seattle Opera first as auxiliaries. The AGMA agreement provides that alternates are designated from among the auxiliary ranks. Even though the AGMA agreement does not require it, normal practice is for the Employer to choose an auxiliary if no alternate is available to perform as a temporary regular chorister.

Auxiliary choristers are paid \$214 for each production in which they perform, and, in addition, receive two tickets to the orchestra dress rehearsal of that show and two tickets to each of four dress rehearsals the following season. Whereas other choristers and volunteers are required to submit an expense report or receipts to receive reimbursement for their expenses, auxiliary choristers automatically receive \$214 at the end of the production,

<sup>1</sup> There are six to eight musical rehearsals, seven to nine staging rehearsals, and six to eight performances per production.

<sup>2</sup> Supernumeraries are performers with nonspeaking parts.

whether they incur expenses or not. Deductions are not taken from auxiliaries' checks, but the Employer's workers' compensation insurance covers auxiliary choristers.

#### Analysis

Relying on *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999), and *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), the Regional Director found that auxiliary choristers are not statutory employees, but are volunteers, based on the absence of a sufficient economic relationship with the Employer. The Regional Director acknowledged that auxiliary choristers receive monetary payment from the Employer, but concluded that one could not function as an auxiliary chorister primarily for immediate financial gain.<sup>3</sup> We find, contrary to the Regional Director, that auxiliary choristers are employees under Section 2(3) of the Act.

Like the Regional Director and the parties, we look to our recent decision in *WBAI* to provide the framework for our analysis.<sup>4</sup> In *WBAI*, we found that the radio station's unpaid staff were volunteers, and not statutory employees, because there was no economic aspect to their relationship with the employer. Looking to the Supreme Court's definition of employee as stated in *NLRB v. Town & Country Electric*, 516 U.S. 85, 90 (1995), we found that the Court's definition is "bounded by the presence of some form of economic relationship between the employer and the individual held to have statutory employee status." *WBAI*, supra. The Board stressed that to work for hire means, "to receive compensation for labor or services." *Id.* At the very least, the Board stated, where statutory employee status is found, there is a "rudimentary economic relationship, actual or anticipated, between employee and employer." *Id.*

Applying these teachings of the Court and Board, we find, under *Town & Country* and *WBAI*, that auxiliary choristers are employees as defined in Section 2(3) of the Act. Central to our analysis is that there is an economic relationship with the Employer. Auxiliary choristers receive monetary remuneration. The Employer argues that the auxiliaries' remuneration is intended to defray transportation and parking costs incurred while auxiliaries attend rehearsals and performances. However, auxiliaries, unlike other individuals whose expenses are reimbursed by the Employer, are not required to submit receipts or expense reports, and they receive remuneration in the amount of \$214 at the end of a production whether

or not they incur costs. Therefore we find the auxiliaries' remuneration to be compensation for their work.<sup>5</sup> The unpaid staff in *WBAI*, unlike the auxiliary choristers, received no wages or fringe benefits, and in fact raised money for or contributed money to the radio station. The Board noted that any "compensation" received by the unpaid staff was nonmonetary and in the form of personal satisfaction in providing a service to the community and ensuring the continued existence of the station. Like the unpaid staff in *WBAI*, auxiliary choristers provide a service to the community and presumably derive pleasure and satisfaction in performing, as do all choristers. Unlike in *WBAI*, however, auxiliary choristers also receive some monetary compensation for their work.

Additionally, auxiliary choristers are clearly in an employment relationship with the Employer. By signing a letter of intent and signing in at each rehearsal, auxiliaries agree to attend rehearsals and performances on time, at times designated by the Employer. They are given explicit instructions on decorum and conduct and are expected to comply with conditions set forth in a handbook developed specifically for them. Moreover, auxiliary choristers audition with alternates and, according to their handbook, receive feedback and are subject to normal expectations of performing the music and staging. Unpaid staff in *WBAI*, on the other hand, worked independently once the program they produced was approved.

Auxiliary choristers are critical to the Employer's productions. The AGMA agreement provides that if a regular chorister or temporary regular chorister is on leave, or a production requires more than 36 choristers, the Employer look to its alternates to fill the positions. As noted above, alternates are auxiliaries designated to be alternates by the Employer. In the event that there are not enough alternates for particular singing parts, auxiliary choristers are used. When auxiliaries become alternates or temporary regular choristers they receive compensation for their work for the Employer and are considered paid staff for the entire production.

Further supporting our finding of employee status is that performing as an auxiliary chorister may lead to becoming an alternate, and then a regular, chorister. In fact, performing as an auxiliary chorister counts toward satisfying the prerequisite for employment as a general chorister, i.e., that the applicant has sung in two previous productions. In addition, it is clear that the majority of current regular choristers were once auxiliaries. Furthermore, auxiliaries benefit from sharing rehearsals, makeup instruction, costume fittings, and dressing rooms with other choristers, in learning their trade. The Board in *WBAI* found, in marked contrast to this case, that un-

<sup>3</sup> The Regional Director calculated that auxiliaries are compensated at "roughly" \$3 per hour for each production, including rehearsal and performance time.

<sup>4</sup> The other case cited by the Regional Director, *Tony & Susan Alamo Foundation*, supra, involved employee status under the Fair Labor Standards Act, 29 U.S.C.A. § 203 (1938), not the National Labor Relations Act. In that case the Supreme Court relied on the definition of "wage" under the FLSA as specifically including nonmonetary benefits and found the employer's associates were employees since they depended on their employer for food, shelter, clothing, and medical benefits.

<sup>5</sup> Like most other choristers, auxiliaries do earn supplemental income at different jobs during the day. That they have additional employment, as other employees also may have, does not affect the auxiliaries' employee status.

paid staff positions were not paths or stepping stones to paid positions.

Finally, auxiliary choristers are treated differently than the Employer's supernumeraries and children's chorus. As noted above, supernumeraries and the children's chorus have separate dressing rooms, are listed separately in the opera program under their volunteer positions, are required to present receipts or expense reports, and are reimbursed per rehearsal and performance. Auxiliary choristers, on the other hand, share dressing rooms with regular choristers, are listed in the opera program along with all other choristers under the general heading "Chorus," do not present receipts or expense reports, and receive the same compensation at the end of each production.

As our decision in *WBAI* indicates, at the heart of the Supreme Court decisions considering whether disputed individuals are employees within the meaning of Section 2(3), is the principle that employee status must be determined against the background of the policies and purposes of the Act. We specifically found in *WBAI* that the Act addresses the "fundamentally economic relationship" between employers and employees, and states as policy

that equality of bargaining power in this relationship, through collective bargaining, "safeguards commerce from the harm caused by labor disputes." 328 NLRB 1273. Importantly, to find individuals not to be employees because they are compensated at less than the minimum wage, or because their compensation is less than a living wage, contravenes the stated principles of the Act.

For all these reasons, we conclude that auxiliary choristers are employees within the meaning of Section 2(3) of the Act.<sup>6</sup>

#### ORDER

IT IS ORDERED that this matter be remanded to the Regional Director for further appropriate action.

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<sup>6</sup> Before the Regional Director, the Employer contended that even if auxiliary choristers are considered statutory employees, they are casual employees and therefore lack a sufficient community of interest with the other choristers in the unit. Because the Regional Director found the auxiliary choristers were not employees, he did not address this issue. We find that this issue should first be considered by the Regional Director and express no opinion as to it.